UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE PORT ANTITRUST LITIGATION	)	File No. 18-cv-1776 (JRT/HB)
This Document Relates to:	)	
Direct Action Plaintiffs	)	St. Paul, Minnesota Courtroom 7C December 17, 2021 Via Video Conference 2:49 p.m.

BEFORE THE HONORABLE HILDY BOWBEER
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(INFORMAL DISPUTE RESOLUTION CONFERENCE)

Proceedings recorded by mechanical stenography; transcript produced by computer.

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P R O C E E D I N G S

IN OPEN COURT

THE COURT: This is the United States District Court for the District of Minnesota.

We are convened by zoom this afternoon for an informal dispute resolution conference in the matter of 18-cv-1776, the In Re Pork Antitrust Litigation.

Specifically, this IDR is based on letters that were submitted on behalf of the MDL direct action plaintiffs at Docket Number 1022 and by the defendants in the -- in those direct actions. Their letter was submitted at Docket Number 1035.

The specific issue here has to do with search terms and the development and negotiation of search terms.

What I'd like to do first is just identify who is in attendance that wants their appearance noted for this particular hearing.

And I will simply go through with in no particular order the names that I see on the screen, although I will note particularly the ones that I understand are going to be speaking to the particular issue raised by the IDR.

So, first, I see on screen Mr. Mitchell, who I know is going to be speaking on behalf of the MDL direct action plaintiffs. Is that correct, sir?

MR. MITCHELL: That is correct, Your Honor. Thank

you.

THE COURT: All right. And I see Jarod Taylor who I understand is going to be speaking on behalf of all defendants. Is that correct?

MR. TAYLOR: That's correct.

THE COURT: All right.

And then in addition, and in no particular order but we will assign you to your appropriate bucket when we do the minutes for this, I see Nicci Warr. I see Brian Clark. Blaine Finley, Brian Robinson, Tessa Jacob, Don Heeman, Richard Vagas, Michelle Looby, Shana Scarlett, David Eddy, Craig Coleman and Vanessa Barsanti.

Let me ask if there's anyone else who specifically wanted their appearance noted for this IDR proceeding whose name I did not call? Going once. Going twice.

All right.

So just to kind of level set so everybody understands the nature of this proceeding this is, as I said, is an IDR or informal dispute resolution proceeding, it has been presented to me on the basis of letters rather than the kinds of formal briefs that would go with formal motion practice under Local Rule 7.1B.

My understanding is that the parties to this particular dispute have agreed to submit it through the IDR process. And one of the -- part of that agreement is that

you going to live with the outcome. In other words, because of the informality of the process parties who agree to engage in IDR are agreeing that they will live with my result regardless of whether they are satisfied or disappointed with it.

So I just want to make sure everybody understands that even though we are on the record for this IDR, which is not always my practice, but even though we are on the record -- yes, Ms. Krenz.

(Court Reporter interrupted.)

THE COURT: Good reminder. If you are on the phone, please make sure your device is muted.

So as I said, that even though we're on the record for this proceeding the part of the -- the tradeoff for the IDR process is that the parties are agreeing to live with the decision that I make, which I will be making on this -- as a part of this zoom meeting.

So any question about that? Mr. Mitchell?

MR. MITCHELL: No, Your Honor. Thank you.

THE COURT: Mr. Taylor?

MR. TAYLOR: No, Your Honor.

THE COURT: All right. So I have read the parties' submissions. And let me pull up my notes here. Just a moment, I've got to switch my notes to the correct set. Hold on. All right. Okay. Very well.

So I understand the fundamentals, but let me give each of you a chance to give me an overview of your position to kick us off and then I will have some questions for each of you as well.

So, Mr. Mitchell, I think you wrote the first letters so you get the first say.

MR. MITCHELL: Yes. Thank you, Your Honor for indulging us on this Friday afternoon to talk about search terms.

I think the crux of the dispute before you is whether the MDL direct action plaintiffs are entitled to one -- at least one fair shot at their own search terms in the case.

The defendants have taken the position that we should be -- we as a group, the MDL direct action plaintiffs, and I'll receive to them as just the DAPs for shorthand, should be or are limited to the search terms that the defendants agreed to with the class plaintiffs. And that they, the defendants, need not consider any additional terms beyond those that are related to issues unique to the the DAP complaints.

And I think that as -- and there are just a few issues that I'd like to address, you know, in my presentation.

The first is as a matter of principle and law we

do not believe that the defendants are correct that the DAPs should be forced to live with whatever deal the defendants struck with the classes. The defendants in their letter cite no case and we are aware of none that says that direct action plaintiffs or opt-out plaintiffs like the DAPs here are, are limited only to discovery that is unique to their complaints in this context.

The DAPs, as you may well know, including one of the clients that I represent, Sysco, are some of the largest pork buyers in the United States. We filed our own cases all over the country. And but for the fact that we were transferred by the JPML to this Court and consolidated by Judge Tunheim with this case, we believe we would be entitled to our own discovery, including the use -- the use of search terms.

I think that -- that said, we, of course, understand, you know -- the issue being are we entitled to our own -- to at least one shot on search terms. But we do understand that we will most certainly be entitled to only one shot and we also understand that that our requests for search terms are subject to the principles of relevance and proportionality and in light of what has occurred in this case to date.

We understand that our requests for additional search terms must be reasonable. And it is our view that we

have very much tried to do this in the course of the meet and confers over the terms at issue and in our view the defendants have not.

And what I mean by that is the defendants have not offered any specific objections to any of the terms at issue nor have they done what we believe is required by the law to substantiate the burden objection that they have made.

First, just a few points as to relevance. As I said, the defendants -- and we say in our letter, the defendants in our view have not meaningfully disputed the relevance of any of the terms at issue.

We have invited them to do so multiple times including by sending a spreadsheet that had a column for them to identify any objections that they had to the terms and they declined to take us up on that invitation.

The terms at issue really fall into two groups.

Most of the terms are terms that at least one or more of the defendants have agreed to use but other defendants have not for reasons that are unknown to us. We have tried to do our best to sift through the correspondence that we received between the defendants and the classes, but for reasons that are unknown to us and that have not been explained to us by the defendants, we are merely asking for with respect to most of the terms consistency across the defendants or at a minimum, which we have not received, an

explanation as to what the reason is for the discrepancy across the defendants.

The other category of terms in dispute are entirely new terms, and I believe there are only eighteen of those, so these would be entirely new terms that for reasons also unknown to us, either the classes did not ask for or dropped at some point in the negotiations. And we believe that those terms are relevant. And we have explained in our spreadsheet provided to the defendants and to the Court why we believe that to be the case and the defendants have not responded in any meaningful way. Certainly not in any way specific to each term, which we think the defendants should do.

The next, I think, part of this analysis of, you know, is what we are asking for proportional? And is defendants' burden objection. And as we stated in our letter, and I don't want to belabor it too much, I think the law is clear in this district that they have to do more than what they have done to establish and substantiate a burden objection.

At a minimum, they should have provided us a search term hit report providing the number of hits on each term. We invited them to do so multiple times but, again, they declined.

I think that is not only inconsistent with the law

in this district but also the Sedona Principles on cooperation, which we know are attached to your practice pointers, which call for an urge transparency in the negotiations for ESI and also the Sedona Principles on proportionality, which make very clear that when a party lodges a burden objection to search terms they should or must provide a hit report. Because without that kind of information neither the party requesting the terms nor the court can assess what the burden is with respect to particular terms.

It's unclear to us why the defendants have refused or been so reluctant to provide that information to us. We do not think it would be hard to generate. I suspect, although I don't know, that the defendants may have, in fact, already generated search term hit reports on the terms we have requested.

But without that information we are left to merely speculate and I think you are left to merely speculate what the burden is with respect to these search terms at issue and, therefore, cannot make any determination about what is proportional or not with respect to our terms.

There's just one other argument that the defendants made in their letter which obviously we did not have to reply to which is, I think, based on unfairness. They make the point that if the Court were to accept our

position as to new terms by the MDL direct action plaintiffs they and the Court will be confronted with this every time a new direct action plaintiff or a new wave of direct action plaintiff cases is filed. And I think that that's wrong for several reasons.

The existing DAPs have coordinated very closely on the search terms that are in dispute. And there is currently no reason to believe in our view that there will be subsequent waves of additional DAPs who are, and this is the key point, unlikely to accept what the current DAPs are seeking. Any new DAPs with existing counsel, I think it's safe to assume, will not be seeking additional terms.

Exhibit B to the defendants' letter I think makes that clear. The e-mail attached as Exhibit B to their letter is an e-mail from counsel for existing DAPs telling the defendants that there may be additional cases and indicating that the views they take with respect to those new plaintiffs and new cases will be consistent with or intend to be consistent with the positions taken by their current DAPs, who are a part of this dispute before the Court now.

There had been no new DAP counsel that has entered this case in months. Even if there were, I think it's safe to assume that those counsel are very likely to have participated in the *Broilers* case and including with the

counsel in this case, and will understand that the DAP group should have and had only one shot at additional terms. And they -- the burden will be very high for any new additional DAPs so seek new terms beyond those that we are seeking now.

So to conclude I think all we're asking for here is at least one fair shot for some search terms that we believe are relevant and important to the case. And in the absence of any substantiation of defendants' burden objection, their objection should be overruled and those terms -- and they should be instructed to provide those terms.

THE COURT: Let me ask --

MR. MITCHELL: -- those terms.

THE COURT: Let me ask you some questions and then I'll give Mr. Taylor a chance to speak.

First, have you looked at what you've already gotten? And what can you tell me, if anything, about what gaps you've identified in what you've received?

And a part of what I'm struggling with here is that, you know, search terms are a means to an end. Search terms are not in and of themselves clearly relevant or not relevant, but they're designed to try to get at relevant information but they tend to pull up a whole bunch of stuff that isn't along with what may turn out to be relevant.

So I'm -- we can't pretend that a whole lot of

work hasn't already been done in this case and a whole lot of documents already provided in response to requests by excellent experienced plaintiffs' counsel for the class plaintiffs.

So what -- what can you tell me about the analysis of -- you've made of what you've got already and why you believe there are gaps, you know, sub -- yeah, gaps in that production?

MR. MITCHELL: Sure.

So first, I think it is obviously always difficult to access in the abstract what you are missing. We don't know what documents are missing from the documents that have been produced.

Now that said, we have made an effort to take the terms that are at issue and apply them to the existing productions to see what those terms might yield. And I can take you through a few examples if it would be helpful.

THE COURT: Mm-hmm.

MR. MITCHELL: For example, Term Number 11 in our spreadsheet, Rabo, relates to Rabobank. Now that is a term that all defendants, except Hormel, have agreed to run or some version of it. And we are simply asking now for Hormel to run that term given that the other defendants have agreed to do so it.

And when we run that term across the defendants'

productions we find that there are relevant documents, responsive and relevant documents.

Now, can I describe for you specific documents that appear to be missing based on that term or other terms that we are proposing to provide? Not at this point. We are still obviously making our way through the many documents -- the millions of documents that have been produced.

But I will just make one other point on this which is if the terms -- and admittedly there were many that defendants in the classes agreed to, if the terms were as comprehensive, and I think the defendant has suggested broad as they contend, that it stands to reason that it may well be the case that all or most of the responsive documents have already been caught up and that our terms will not meaningfully add to the relevant documents in the case.

But, again, without a hit report telling us what our terms yield, it is impossible to know the answer to that question, so.

And there are other terms as well. You know, one of the terms we proposed, Term 77, is a Sysco-specific term that relates to information that was discovered in the *Broilers* case in which we learned there that Sysco had made a request of the defendants for a modification to certain credit terms and that the allegations are in the *Broilers*

case, that the defendants, and these are included in public indictments in the case, that defendants as part of the conspiracy there reached agreement as to how to respond to Sysco's request for modification of credit terms.

So that is another term where we believe clearly there is a gap in the existing productions and thus justifies the application of that term.

So I don't know if -- I hope that answers your question. I'm happy to provide more detail on additional terms if that would be helpful but I will pause there.

THE COURT: Okay. All right. Thank you, Mr. Mitchell.

Mr. Taylor, let me hear from you.

MR. TAYLOR: Yes, Your Honor.

Opposing counsel started off by stating their view of the case which was that believed the crux was later they were entitled to one fair shot at their own terms.

And I believe if I heard and remember correctly, Mr. Mitchell said that they would have gotten that shot but for their centralization and consolidation and transfer to this case. But the fact is that they were centralized into an MDL. They were transferred to this case. And they were recently by Judge Tunheim's order consolidated into the 1776 case.

So we have to look so the effect and words of that

order which guide the consolidation. That was -- consolidation was made over MDL DAP's objection and after briefing and the Court acknowledged, of course, that the allegations were essentially identical between MDL DAPs in the classes, but it also acknowledged that, "Differences between the cases may create individualized discovery and that the Court can accommodate these issues as necessary to ensure each member case is resolved on its own legal theories and merits."

That's much different from the Court saying MDL DAPs are entitled to renegotiate an agreement as impactful and that took as long to come to conclusion as it did as the search terms that resulted in production of over 3 million documents in a course of over half a year.

Defendants have already offered to discuss and have agreed to terms that they identified as relating to potential differences between the cases, as the Court put it, and we are running those terms, have produced those terms.

So to one of the examples that Mr. Mitchell raised relating particularly to Sysco, again, you know, we told MDL -- defendants told MDL DAPs which terms we believed related particularly to the MDL DAPs as opposed to all of the plaintiffs collectively and are willing to negotiate DAP terms. If that is one more term, I'm sure defendants would

be willing to look at it. But when you look at all of the dozens of other terms it's clear that they go much more broadly than that and without justification.

I think you identified -- or Your Honor identified one of the key questions, which is what are the gaps. I believe MDL DAPs have had defendants' productions since the summer and so by now there has been time to actually create a record. We don't have documents on this subject, we don't have documents on that subject, and I don't believe MDL DAPs have attempted to do so.

I think -- I think Mr. Mitchell is right that we haven't -- we haven't cited a case that is very specific and analogous to the facts here stating expressly that MDL DAPs in a case like this must be limited to prior negotiated terms, but I think that's because of a dearth of the case law not because the principle is wrong. Because I note that MDL DAPs similarly cite no case holding that they're entitled as a matter of right to negotiate terms that were previously negotiated.

I think we are looking -- we all agreed that the Rule 26 proportionality standard that we're all familiar with governs here but with the tweak that it has to be proportional looking at the entire scope of the case, as Your Honor identified that has come before.

And, you know, Your Honor took some of the wind

out of my sails I think because one of the other points we wanted to highlight was that in fact MDL DAPs were represented as class members a year ago when those negotiations were struck by, compliments to our opposing counsel, able counsel who have zealously prosecuted this case. We had hundreds of search term strings agreed to for each individual defendant, let alone all of them combined. And Your Honor will recall that we have been here before on motions to compel by plaintiffs, so they did not go easy on us, I'll just -- I'll put it that way.

And the burden that we're looking at is substantial. MDL DAPs have faulted defendants for not providing hit reports, but I don't think it can be the case that every time a new search term or new dozens of search terms are demanded, okay, we go back to the well, now we're doing hit reports, we're negotiating each line item. I think by this point in the case the threshold is, okay, that months and months of work has been done, is there a particularized cause for new terms?

In that case we did the hit report work. We spent some time doing some tweaks to the terms that were actually specific to DAPs and as I mentioned, we are now producing those, but there is a threshold issue that comes before negotiating on a line-by-line basis with hit reports, 90 additional search strings and that is, Why? What don't you

have already? What allegations do you have particularly unique to your client that are not covered by any of the search terms negotiated with plaintiffs?

Sure there are -- some of the -- defendants do not concede that a showing of relevance has been made as to many of these terms. For example, FBI is a term. Civil investigative demand is a term. Not limited to pork, not limited to the issues in this case, there are -- there are other examples. But even -- even so, even if all of the terms were relevant, there's always another term. You can't exhaust all the words in the English language.

We have hundreds of terms and now there has to be some showing of why they're not sufficient and that has not been made.

THE COURT: Let me ask this. In the negotiations with the -- with counsel for the class plaintiffs, there was an initial period of negotiation that wound up in agreement on a defendant by defendant, or at least defendant-family-by-defendant-family basis for -- it sounds like several hundred search strings.

And then after those were run and documents were produced, there was a process by which requests were made for supplemental searches.

Can you tell me a little bit about that and sort of what the bar was and what the process was for coming back

to request a supplemental search and how that -- how that dynamic went?

MR. TAYLOR: Yes, I can, Your Honor. One moment, please.

So Your Honor will recall that there were priority custodians negotiated with class plaintiffs. The hot custodians that counsel really wanted to see upfront, and we substantially produced their productions, I believe, in early April of this year.

Some months we want by, class plaintiffs had the opportunity to review those. And I believe all defendants, at least nearly all defendants and certainly Tyson then in June got requests from class plaintiffs for additional search strings. Again, at least in Tyson's case, those were dozen of search strings and class plaintiffs in their transmittal e-mail represented that those were based on a review of the documents from the priority custodians.

We then negotiated another dozens of sets of terms. And for Tyson we came to conclusion on those terms in early September and only shortly after that though, a couple of weeks, we subsequentially completed production because for the most part we were able to come to some conclusion in July or August and went ahead and began the review process and the production process while we waited for those final kinks to be worked out.

So in Defendants' Exhibit A, as an example of the types of search terms agreed to with class plaintiffs, I believe Row Number 317 is the cutoff or the original terms negotiate with plaintiffs and the terms after that were negotiated in -- between June and technically September, but full candor it didn't take us really that long to settle on the crux of the terms.

THE COURT: Okay. All right. All right. Thank you. Let me see if I had any other questions.

There in your letter you did cite by way of example that, as I recall, that the Smithfield terms that were requested by the direct action plaintiffs had generated 800,000 or a million additional documents.

So at least in that respect somebody ran a hit list?

MR. TAYLOR: Yes, Your Honor. I think most defendants, I don't know that all, most ran kind of a total hit for all of the terms MDL DAPs were seeking.

It's somewhat -- you know, that's part of the complication and the burden here. It's never easy to negotiate these things. Because what that doesn't really tell you necessarily is which terms bring in the most terms that are not also brought by other terms.

But, I mean, most defendants I think have a general sense of how much it would -- total would have to be

reviewed if all of the terms demanded were adopted. And it varies pretty widely among the defendants, some have a lot, some fewer, none, you know, they're all in the tens of thousands for everyone who was provided -- run the terms and provided them. So for none of them is it de minimis.

THE COURT: And is that -- and when you're referring to that in the Smithfield examples, specifically, those were -- that number, 800,000, or whatever it was, that was additional documents? In other words, documents that were -- that were -- that had not been included in any of the productions so far?

MR. TAYLOR: Correct, Your Honor. Not included in the productions. So it's any document hitting on those terms then bringing in the attachments or parents, the full family of those documents.

THE COURT: Mm-hmm.

MR. TAYLOR: Not produced --

THE COURT: And then subtracting out what had already been produced.

MR. TAYLOR: Correct.

THE COURT: All right. Okay. I think that was the one thing I wanted to make sure I understood. Thank you, Mr. Taylor.

Mr. Mitchell, anything further?

MR. MITCHELL: Just a couple of brief comments.

So Mr. Taylor made a comment about what I think that they also described in their letter as generic terms. I think the example he used was Attorney General or FBI. The fact that a few of the terms may be too generic in their view is a claim of overbreadth not relevance that it captures more of the documents than it should.

But terms like Attorney Generals, within ten of CID or destroy within five of Re, which were among the terms described as too generic, I don't expect that those terms would yield a significant amount of documents. It would shock me if that were the case.

Which underscores, I think, the need for having a hit report that identifies the number of documents yielded by each of these terms individually.

It is my experience that there is -- it would not be possible to run all of these terms at one time. The systems just don't typically allow that to run. You couldn't run all 90 of these terms in one search, at least that has been my experience.

And it is not extraordinarily burdensome when you receive an excel spreadsheet like this and you have a document repository where the documents collected are sitting to run the terms like we have produced in spreadsheet form and generate a hit count by term.

And it seems -- I didn't hear Mr. Taylor say that

the defendants have not done that and if they have, I don't see the difficulty or burden in providing that information to the DAPs so that we can assess whether our terms are overly broad or overly burdensome. Without that information it's impossible for us to assess that and we contend the same is true for you in assessing that.

THE COURT: Let me ask this. And I sort of early on in this conversation noted that search terms themselves are not relevant or not relevant -- I mean search terms themselves aren't requests for documents, they're not Rule 34 requests, there are ways of getting to it.

Have Rule 34 requests been served?

MR. MITCHELL: Yes, they have, Your Honor.

THE COURT: Okay. And have -- what I'm trying to understand is -- well, have those Rule 34 requests been negotiated?

In other words, have you gotten to -- have you come to an understanding about what the metes and bounds will be of the responses to those requests or are those responses -- and I'm forgetting where things stand with in terms of what to do when.

Have responses to those requests been served and have you negotiated what the metes and bounds of the responses will be?

MR. MITCHELL: The -- forgive me for not knowing

the exact date. I want to say a few weeks ago we received from each of the defendants written responses and objections to the direct action plaintiffs RFPs. We are in the process of reviewing those.

I will say that there appear to be substantial differences among the defendants as to the responses.

So assessing who has agreed to provide documents in response to which request is the process that we are undertaking right now to identify any issues that we may have with those responses so that we can bring them to the attention of the defendants. We are very much in the middle of that process right now.

THE COURT: Okay. All right. All right.

Let me take a couple of minutes off screen to think about my ruling here. And I will be back on in just a moment. I will stop the recording in the meantime.

(Recess at 3:28 p.m.)

(Reconvene at 3:50 p.m.)

THE COURT: All right. Thank you for your patience. It looks like we may have had some attrition among the attendees, but we are back on the record in connection with the IDR proceeding with regard to the dispute between the MDL direct action plaintiffs and the defendants about search terms.

I am going to deny the MDL DAPs' request for an

order that defendants run their 90 -- I think it was 90, proposed global terms.

Unlike the cases that were cited -- the case law that was cited in the plaintiffs letter we're not writing on a blank slate here and the defendants have already responded to discovery requests that involved tremendous overlap in the issues and have produced millions of documents.

The search strategy that led to that production was negotiated over a significant period of time with highly capable class counsel who have been living with this case since 2018. So this isn't a situation in which lawyers who don't know which end is up in antitrust litigation were somehow overmatched or overborne in negotiating search terms with defense counsel.

And so I think that does shift the proportionality analysis in some significant ways.

Proportionality requires that we look at the incremental value of the additional discovery sought. And so in this scenario I don't agree with -- Mr. Mitchell, with your -- with the position that you're entitled to your one free shot on search terms. I think that because of the consolidation of the cases that simply isn't true here. The consolidation did change that calculus and changed that paradigm.

And the case law, of course, is plentiful that one

side isn't entitled to have the other side search for every single responsive document in any event.

So I do think in this instance that defendants are correct that the burden starts with the direct action plaintiffs to assess what you have already and to be able to explain to the defendants with some specificity how what you have is deficient and why that gap -- like why the documents that you hope would fill that gap would have incremental value that is important to the resolution of issues in the case.

As for burden, you're absolutely, right, Mr. Mitchell, that ordinarily, and I'm not ruling that out down the line as you will see, but ordinarily defendants do have an obligation to show the burden part of the proportionality analysis. But, again, we're not writing on a blank slate here and it does take into account about what has already been done.

And so I think particularly in a case where several hundred search terms have already been run and several million documents already produced, I don't think that defendants have to come up with search term hit lists for me to conclude that running another 90 terms, many of which do contain some very generic language and are definitely overlapping with what's already been done, I don't need a bunch of hit lists to tell me that that creates

a significant burden and that you haven't shown me enough to conclude that the incremental value of those searches justifies that burden.

But before the defendants go off, you know, irrationally exuberant, there is a sliding scale here and I am not deciding at this point that it is required that the additional value you show or the gap you identify has to be unique to the particular DAP or to the -- or the unique position of the DAPs in this case.

I think that that can -- I think that that is a relevant factor but I'm not saying that's the sine qua non of you being able to ask for more.

So, for example, if after you review the documents you have you can show that there's a limited number of precise additional search terms that was needed to capture something that those other guys missed, even if it wasn't necessarily tied to who you are as a plaintiff compared to who they are as class plaintiffs. I am not -- I'm not ruling that out here. I'm not saying that you can only get what's unique to your role as DAPs.

If you could show that there was something that was missed, whether it was unique to your role as DAPs or just by saying there's a gap here and these search terms didn't cover that gap and here's why that gap's important, then the burden would shift to the defendants to run that

hit list for the search term or terms you're proposing and engage in that proportionality analysis. Yes. I see what you're going after, here's how burdensome it would be. Let's talk about a different way of getting there.

So I think there are scenarios under which the burden can be triggered on the defendants to show burden but the -- I am rejecting the sort of baseline premise that as DAPs you get your free shot at a bunch of search terms where it really looks like overwhelmingly the issues have been covered by the work that was already done.

Another scenario, and this is why I asked about Rule 34 requests, certainly if after you negotiate with the defendants the metes and bounds of their responses to Rule 34 requests, and you can show why the search terms that were run weren't adequate to address those Rule 34 requests. That's something you can raise.

And, again, the defendants may need to -- may then need to engage with you on the burden of filling that -- of filling that gap.

Defendants, and you quoted the Sedona Principles, of course, those are near and dear to my heart, defendants have a responsibility to and are often, as Sedona notes, are in the best position to come up with a search strategy that will fulfill their obligations but that also puts an obligation on them so they, too, will need to be confident

that whatever the search terms were run they were reasonably calculated to get to what they promised to give you. So that could also trigger a further conversation about some specific terms.

But I'm -- but right now I don't believe, particularly with a list of 90, I'm not satisfied that you have shown what you need to show Mr. Mitchell to shift the burden to the defendants to quantify a burden for doing a bunch of additional work that they've got good reason to believe has largely been done in this case.

So that's where I come out on this IDR. I recognize it may kick the can down the road, but hopefully for a much more precise conversation and ideally for one that could be worked out through a meet and confer process and wouldn't -- and wouldn't require further intervention.

Mr. Mitchell, any questions at this point?

MR. MITCHELL: No questions. But thank you for that guidance going forward.

THE COURT: All right. Mr. Taylor, any questions about anything I've said?

MR. TAYLOR: Nothing further from defendants, Your Honor. Thank you.

THE COURT: All right. Well, thank you all. Appreciate your patience with the work we did this afternoon.

And as always, a thanks to our court reporter for her seeing us all the way through the process.

We're adjourned.

(Court adjourned at 4:00 p.m.)

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REPORTER'S CERTIFICATE VIDEO CONFERENCE

I certify the foregoing pages of typewritten material constitute a full, true and correct transcript of the video conference hearing, as they purport to contain, of the proceedings reported by me at the time and place hereinbefore mentioned.

/s/Lynne M. Krenz
Lynne M. Krenz, RMR, CRR, CRC